U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 17 April 2006

BALCA Case No.: 2005-INA-00151
ETA Case No.: 2004-NJ-02511225

In the Matter of:

ERC CONSTRUCTION CO.,
Employer,

o*n behalf of*

GILSON FURTADO,
Alien.

Appearance: Cassandre C. Lamarre, Esquire
Newark, New Jersey
For the Employer and the Alien

Certifying Officer: Dolores DeHaan
New York, New York

Before: **Burke, Chapman, and Vittone**[1]
Administrative Law Judges

DECISION AND ORDER[2]

PER CURIAM. This case arises out of an application for labor certification[3] on behalf of Gilson Furtado (hereinafter "the Alien") filed by the ERC Construction Company (hereinafter

[1] Associate Chief Administrative Law Judge Thomas M. Burke did not participate in this matter.

[2] Citations to the Appeal File are abbreviated as "AF."

[3] Permanent labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). This application was

"the Employer") for the position of "stonemason." The Certifying Officer (hereinafter "the CO") denied the application and this appeal ensued.

STATEMENT OF THE CASE

The Employer filed the application for labor certification on January 31, 2002. (AF 58-67). The position was listed in the application as "stonemason." The Employer described the job duties of a stonemason as follows:

> Layed [sic] materials such as stone for commercial and residential development projects. Poured, spread and finished all stone repair and builds foundations, walls, sidewalks, porches, steps, stairways, fireplaces, bbq pits, arches, abutments, and sewers. Cut stone according to written specifications and shapes them preparatory to setting using chisel, hammer, grinder, power saw. Aligned stone with plumbing and creased geometric patterns. Spread mortar over stone and sets them in place by hand or by crane. Cleaned surface using muriatic acid and brushes. Supervises one mason helper.

(AF 64). The position required three years of experience in the job offered. (AF 64). The Employer filed a request for Reduction in Recruitment (hereinafter "RIR") processing with its application for certification. (AF 79).

On June 15, 2004, the CO issued a Notice of Findings (hereinafter "NOF") indicating her intent to deny certification pursuant to 20 C.F.R. § 656.3, which defines "employer" as a person, association, firm or corporation which currently has a location within the United States to which U.S. workers may be referred for employment and defines "employment" as permanent, full-time work by employee for an employer other than himself. Moreover, the CO proposed to deny the application under 20 C.F.R. § 656.20(c)(8), which requires the employer to document that the job opportunity has been and is clearly open to any qualified U.S. worker. (AF 47-49). The CO initially noted that the Employer had filed two other applications for labor certification which were pending before her office. In the present application, the Employer was listed as ERC

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filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Registrar, National Archives and Record Administration, 20 C.F.R. Part 656 (revised as of Apr. 1, 2004), unless otherwise noted.

Construction, Inc., while the other two applications showed the employer as ERC Construction. The CO directed the Employer to document the date the business was formed, as well as the names and titles of all owners and their dates of ownership. The CO further instructed the Employer to document the date on which the business was incorporated and the names and titles of all owners and corporate officers, as well as the starting and ending dates of positions held. The CO requested that evidence such as copies of business documents and certificates of incorporation be submitted in support of the Employer's statements.

The CO then advised the Employer that there was no listing for the Employer's company name or Federal Employment Identification Number (hereinafter "FEIN") in the New Jersey Unemployment Insurance computer system. Thus, the CO instructed that in order to rebut the finding that it did not appear that a job opening existed to which U.S. workers could be referred, the Employer was required to document the number of years it had been in business and explain why there was no currently active listing for the company in the state UI system. The Employer was directed to submit documentation regarding the total number of workers and the number of stonemasons on staff from the year the application was filed until the present, including their names, job duties, whether they worked on a full or part-time basis, and whether they were deemed "employee or non-employee." (AF 49). Further, the CO requested copies of employees' W-2 or 1099 MISC forms, and federal Employer Quarterly Taxes (Form IRS-941) for 2002 through 2004.

Moreover, the CO instructed that documentation submitted by the Employer must include copies of applicable "State Employer Quarterly Reports," and "Employer Report of Wages and Withholding Tax" paid for all quarters from the year the application was filed through and including the present year. The CO explained that failure to furnish said documents constituted a violation of 20 C.F.R. § 656.20(c), which states that employer's job opportunity terms, conditions, and occupational environment shall not be contrary to federal, state, or local law. (AF 49). Finally, the CO determined that the Employer must document how it could guarantee permanent, full-time, year-round work performing the duties of a stonemason. The CO instructed that the documentation must include, but was not limited to "copies of contracts, invoices, etc." from the year the application was filed through the present year. (AF 49).

In rebuttal, the Employer submitted a cover letter from the owner, Enrique Carballo, indicating that Edmardo Rodrigues is a thirty percent partner, but Mr. Carballo ran the business "day in and day out." (AF 28). The Employer also attached a list of employees since 2001 and a copy of the phone bill. (AF 29, 33-34). He additionally attached a workers' compensation audit form. (AF 30-32). He explained that he claims his company under his personal taxes and pays out 1099's (non-employee compensation) for his employees. (AF 28). He stated that he does not have contracts, as he "previously explained."[4] The Employer also submitted a copy of his corporate tax return for the year 2003. (AF 35-38).

On March 22, 2005, the CO issued a Final Determination (hereinafter "FD") denying labor certification. (AF 13-15). Citing to 20 C.F.R. §§ 656.3 and 656.20(c), the CO noted that the Employer failed to document a *bona fide* permanent, full-time position, which is open to qualified U.S. workers. (AF 14). The CO noted that the Employer failed to explain why the company is not listed in the state unemployment insurance system and why it failed to furnish signed copies of its tax returns for 2001 and 2002, copies of its Federal Employer Quarterly Taxes (IRS-941), or the applicable State Employer Quarterly Report as instructed in the NOF.

Moreover, the NOF asked the Employer to document "how he can guarantee permanent full-time work as a stonemason by furnishing copies of contracts, invoices, etc.," but the CO noted that no such documentation was provided by the Employer; rather, he simply stated in the rebuttal letter that he did not "have contracts as previously explained." (AF 14). The CO noted that the unsigned copy of the Employer's 2003 tax return indicated that the company was incorporated on February 23, 1998; however, the Employer did not furnish copies of its Federal Employer Quarterly Taxes (IRS-941) or the applicable State Employer Quarterly Report as instructed by the NOF. Further, the CO noted that although the Employer furnished the names and job titles of it employees for the years 2001 though 2003, it did not indicate whether the employees were full or part-time workers, and the Employer did not furnish a list of its workers

[4] The Employer undoubtedly refers to the statements he made in rebuttal in the two other applications he submitted and which were denied by the same CO. In those cases, the Employer explained that he does not use contracts and that he destroys invoices when they have been paid. *See ERC Construction Co.*, 2005-INA-7 (Mar. 9, 2006); *ERC Construction*, 2005-INA-11 (Mar. 9, 2006).

for the year 2004, their names, job duties, whether full or part-time, or employee or non-employee, as directed by the NOF. In addition, the Employer stated in his rebuttal that he "pays out" 1099's, but did not provide copies of same, as instructed by the NOF. The CO noted that 1099 forms are normally used for non-employee compensation. In sum, the CO found that the Employer failed to adequately document why there is no current listing for the company or its telephone number, and that the Employer did not establish that a *bona fide* permanent, full-time, year-round position of stonemason exists to which qualified U.S. workers could apply; accordingly, the Employer's application for labor certification was denied.

By letter dated April 12, 2005, the Employer filed a request for review of the CO's Final Determination before the Board of Alien Labor Certification Appeals (hereinafter "the Board"). (AF 1). The Employer claims that it submitted a copy of its telephone bill which establishes a current listing for the company. Moreover, Mr. Carballo claims that he openly advertised the stonemason position but did not succeed in hiring a qualified U.S. worker. The Employer insists that its tax form from 2003, employee list, and statement sufficiently document the company's "permanent full-time position performing the required job duties to which a U.S. worker could be referred if available." (AF 1). The case was docketed with the Board on May 2, 2005.

DISCUSSION

It is well-settled that the employer bears the burden of proof in certification applications. 20 C.F.R. § 656.2(b); *see Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997). Here, the CO explicitly directed the Employer to submit service contracts documenting the existence of a *bona fide* job opportunity and its ability to provide permanent, full-time employment for a stonemason. In response, the Employer explained that he does not use contracts, as "previously explained."

As the CO explained, the Employer was required to submit documentation that a *bona fide* job opportunity exists. In other words, the Employer had to sufficiently prove that the position of stonemason is a true, permanent, full-time job at ERC Construction; not simply a

position that exists on paper.[5] Thus, a list of company employees since 2001 is insufficient to meet the Employer's burden. Although the list detailed the occupational title of each employee, there was no explanation regarding the duties of each employee, the increased need for stonemasons at this time relative to past years, or whether the present need for a stonemason was full-time and permanent. Nor does the record contain any supporting documentation such as service contracts or invoices explaining how much stonemasonry work the Employer's employees perform. If an employer's evidence does not show that a position is permanent and full-time, certification may be denied. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988) (*en banc*).

Moreover, the Employer did not supply sufficient explanation for its failure to submit an NJ-927 Employer's Quarterly Report or a W-30 Employer Report of Wages Paid, as instructed by the CO, to establish that it in fact has employees. If the CO requests documentation which has a direct bearing on the resolution of an issue, and which is obtainable by reasonable efforts, the employer must produce it. *Gencorp*, 1987-INA-659 (Jan. 13, 1989) (*en banc*). Here, the Employer provided nothing more than a list of a few employees who have been employed since 2001, a copy of a phone bill, an unsigned copy of his 2003 tax return, and an explanation that he does not use contracts.[6]

Although an employer's written assertion constitutes documentation under *Gencorp*, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. Thus, even though the Employer insists that it does not execute service contracts or keep records of invoices, the Employer was required to produce sufficient documentation establishing that a permanent, full-time stonemason position exists, such as an invoice or billing summary setting forth the type of or amount of work performed by a stonemason for a particular project. The Employer provided none. In addition, without proof

[5] *See Pasadena Typewriter & Adding Machine Co., Inc. v. Department of Labor and Alirez Rahmaty v. United States Department of Labor*, No. CV 83-5516-AAH(T) (C.D. Cal., Mar. 26, 1984) (unpublished Order Adopting Report and Recommendations of Magistrate); *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987) (*en banc*).

[6] With the Employer's request for review, the Employer amended the list of employees to indicate whether they worked full or part-time; however, evidence submitted with the request for review will not be considered by the Board. *University of Texas at San Antonio*, 1988-INA-71 (May 9, 1988); *Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 12, 1989) (*en banc*).

that the Employer is not violating the Unemployment Insurance Law, the Employer has not rebutted that it is violating 20 C.F.R. § 656.20(c)(7), which states that an employer's job opportunity terms, conditions, and occupational environment shall not be contrary to state or federal law. Thus, the Employer has not met its burden.

This application was before the CO in the posture of a request for RIR. In *Compaq Computer Corp*., 2002-INA-249 (Sept. 3, 2003), this panel held that when the CO denied an RIR, such a denial should result in the remand of the application to the local job service for regular processing. Since *Compaq Computer Corp.*, however, this panel has recognized that a remand is not required in those circumstances where the application is so fundamentally flawed that a remand would be pointless, such as here, where the Employer failed to establish the existence of a *bona fide* job opportunity. *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004).

Based on the foregoing, we find that the Employer has failed to demonstrate that a *bona fide* job opportunity exists. Accordingly, we find that the CO properly denied labor certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk

Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.